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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-287

PALISADES PAGEANTS, INC., *Petitioner,*

v.

MISS AMERICA PAGEANT, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

STANFORD W. BERMAN
1730 Rhode Island Ave., N. W.
Washington, D. C. 20036
Attorney for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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I. OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINION BELOW

This is an appeal from an opinion of the Court of Customs and Patent Appeals on May 27, 1971, reported at 169 USPQ 790 (CCPA 1971). Appended hereto is a copy of such decision.

II. GROUNDS ON WHICH JURISDICTION IS INVOKED

The date of the judgment sought to be reviewed was May 27, 1971, and the date it was sent to the United States Patent Office was June 28, 1971. The

Court of Customs and Patent Appeals was unable to furnish a "date of entry".

Petitioner did not request a rehearing of the lower Court's opinion.

Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari. 28 U.S.C. 1256.

III. QUESTIONS PRESENTED FOR REVIEW

1. Does the refusal by the Patent Office Trademark Trial and Appeal Board to grant a Motion by an applicant, after the evidence was in, to make its service mark application more definite and in conformity with the evidence, present an issue which is appealable to the Court of Customs and Patent Appeals or appealable to the Commissioner of Patents?

2. Is there a likelihood of confusion from the concurrent use of the marks or names "MISS AMERICA" and "LITTLE MISS AMERICA" in connection with the respective services identified by such marks or names, which include a beauty contest conducted by Respondent for fully blossomed women between 18 and 28 years of age, and by Petitioner for female children between 5 and 10 years of age, taking into account the significant differences between the respective contestants, and also in view of the conditioning of the public to the common use of the terms "Miss" and "America" for beauty contest winners with assorted descriptive adjectives, such as "Miss Tall America", "Miss Teen-Age America", "Miss Tan America", etc.?

IV. STATUTES INVOLVED

With respect to Issue No. 1, the following statutory provisions are relevant:

A. 28 U.S.C. 1542(2) Patent Office decisions

> The Court of Customs and Patent Appeals shall have jurisdiction of appeals from decisions of:
>
> (1) the Board of Appeals and the Board of Interference Examiners of the Patent Office as to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent interference, and such appeal by an applicant shall waive his right to proceed under section 63 of Title 35; and
>
> (2) the Commissioner of Patents as to trademark applications and proceedings as provided in section 1071 of Title 15.

As amended May 24, 1949, c. 139, § 89(b), 63 Stat. 102.

B. 15 U.S.C. 1071(a)(1) Appeal to court and review by civil action

> (a)(1) An applicant for registration of a mark, party to an interference proceeding, party to an opposition proceeding, party to an application to register as a lawful concurrent user, party to a cancellation proceeding, a registrant who has filed an affidavit as provided in section 8, or an applicant for renewal, who is dissatisfied with the decision of the Commissioner or Trademark Trial and Appeal Board, may appeal to the United States Court of Customs and Patent Appeals thereby waiving his right to proceed under section 21(b) hereof: *Provided,* That such appeal shall be dismissed if any adverse party to the proceeding, other than the Commissioner, shall, within

twenty days after the appellant has filed notice of appeal according to section 21(a)(2) hereof, files notice with the Commissioner that he elects to have all further proceedings conducted as provided in section 21(b) hereof. Thereupon, the appellant shall have thirty days thereafter within which to file a civil action under said section 21(b), in default of which the decision appealed from shall govern the further proceedings in the case.

C. PUBLIC LAW 85-609
72 STAT. 540 (1958)

AN ACT

To amend the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of international conventions, and for other purposes," approved July 5, 1946, with respect to proceedings in the Patent Office.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of international conventions, and for other purposes," approved July 5, 1946 (60 Stat. 427), is amended as follows:

(a) Section 17 (15 U.S.C. 1067) is amended by striking the words "the examiner in charge of interferences" and substituting in lieu thereof "a Trademark Trial and Appeal Board," and by adding the following paragraph at the end thereof:

"The Trademark Trial and Appeal Board shall include the Commissioner, the Assistant Commissioners, and such Patent Office employees, designated by the Commissioner and whose qualifications have been approved by the Civil Service

Commission as being adequate for appointment to the position of examiner in charge of interferences. Each case shall be heard by at least three members of the Board, the members hearing such case to be designated by the Commissioner."

(b) Section 20 (15 U.S.C. 1070) is amended (1) by striking the words "Commissioner in person" and substituting in lieu thereof "Trademark Trial and Appeal Board"; (2) by striking the words "of interferences or"; and (3) by changing the word "fees" to "fee."

(c) Section 21 (15 U.S.C. 1071) is amended (1) by inserting after the word "Commissioner" first occurrence in the first sentence, the words "or the Trademark Trial and Appeal Board," and (2) by striking the word "Commissioner" in the proviso in the first sentence and substituting in lieu thereof "Trademark Trial and Appeal Board."

(d) Section 24 (15 U.S.C. 1092) is amended (1) by striking the words "examiner in charge of interferences, who" in the third sentence and substituting in lieu thereof "Trademark Trial and Appeal Board, which" and (2) by striking the word "examiner" in the fourth sentence and substituting in lieu thereof the word "Board".

(e) Section 31 (15 U.S.C. 1113) is amended (1) by striking the words "to the Commissioner" in the phrase "on appeal from an examiner in charge of the registration of marks to the Commissioner, $25," and (2) by striking the phrase "on appeal from an examiner in charge of interferences to the Commissioner, $25."

SEC. 2. The provisions of this Act shall be subject to Reorganization Plan No. 5 of 1950 (64 Stat. 1263).

SEC. 3. This Act shall take effect on approval; it shall apply to ex parte appeals taken to the Com-

missioner prior to the date of approval which have not been heard but shall not apply to any such appeal which has been heard or decided in which event further proceedings may be had as though this Act had not been passed; it shall apply to inter partes cases instituted prior to the date of approval which have not been heard by an examiner of interferences, but shall not apply to any such case which has been heard or decided by an examiner of interferences in which event further proceedings may be had as though this Act had not passed.

Approved August 8, 1958.

With respect to Issue No. 2, the following statutory provisions are relevant:

A. 15 U.S.C. 1052(d)

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

. . .

(d) consists of or comprises a mark which so resembles a mark registered in the Patent Office or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when applied to the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

B. 15 U.S.C. 1053 Service marks registrable

Subject to the provisions relating to the registration of trademarks, so far as they are applicable, service marks used in commerce shall be registrable, in the same manner and with the same effect as are trademarks, and when registered they shall be entitled to the protection provided herein in

the case of trademarks, except when used so as to represent falsely that the owner thereof makes or sells the goods on which such mark is used. The Commissioner may establish a separate register for such service marks. Applications and procedure under this section shall conform as nearly as practicable to those prescribed for the registration of trademarks.

C. 15 U.S.C. 1063 Opposition to registration of marks on the principal register

Any person who believes that he would be damaged by the registration of a mark upon the principal register may, upon payment of the required fee, file a verified opposition in the Patent Office, stating the grounds therefor, within thirty days after the publication under subsection (a) of section 12 of this Act of the mark sought to be registered. For good cause shown, the time for filing opposition may be extended by the Commissioner, who shall notify the applicant. An unverified opposition may be filed by a duly authorized attorney, but such opposition shall be null and void unless verified by the opposer within a reasonable time after such filing to be fixed by the Commissioner. An opposition may be amended under such conditions as may be prescribed by the Commissioner (Amended Oct. 9, 1962, 76 Stat. 769).

D. 15 U.S.C. 1067 Interference, opposition, concurrent use application, cancelation—Procedure

In every case of interference, opposition to registration, application to register as a lawful concurrent user, or application to cancel the registration of a mark, the Commissioner shall give notice to all parties and shall direct a Trademark Trial and Appeal Board to determine and decide the respective rights of registration. The Trademark Trial and Appeal Board shall include the Com-

missioner, the Assistant Commissioners, and such Patent Office employees designated by the Commissioner and whose qualifications have been approved by the Civil Service Commission as being adequate for appointment to the position of examiner in charge of interferences. Each case shall be heard by at least three members of the Board, the members hearing such case to be designated by the Commissioner (Amended Aug. 8, 1958, 72 Stat. 540).

15 U.S.C. 1069 Interference, opposition, concurrent use of application, cancelation—Application of equitable principles

In all inter parties proceedings equitable principles of laches, estoppel, and acquiescence. where applicable, may be considered and applied. The provisions of this section shall also govern proceedings heretofore begun in the Patent Office and not finally determined.

V. STATEMENT OF THE CASE

Palisades Pageants, Inc. applied for registration in the U. S. Patent Office of "LITTLE MISS AMERICA" as a service mark for the services of promoting the sale of the goods and services of others through the medium of beauty contests. After allowance by the Patent Office, Miss America Pageant filed an opposition alleging, *inter alia,* that it had used "MISS AMERICA" as an identifying designation for beauty contests and as its trade name since long prior to the claimed first date of use by Palisades Pageants, Inc. Miss America Pageant asserted ownership of Federal Registration No. 631,496, dated July 24, 1956, for "MISS AMERICA" for the services described in such registration as "promotion of education through the granting of scholarships, the recipients being selected

in local, state and national contests, based on such factors as beauty, personality, and talent". Miss America Pageant contended that the mark presented for registration, i.e., "LITTLE MISS AMERICA", incorporated its mark and trade name and was confusingly similar thereto. Hence, on this basis, Miss America Pageant alleged that it would be damaged if the requested registration for "LITTLE MISS AMERICA" was granted.

Palisades Pageants, Inc. denied the allegations of Miss America Pageant as to the likelihood of confusion and damage and, further, introduced evidence in support of its theory that as the result of the use of the words "Miss" and "America" together with a suggestive adjective or noun to describe a contest winner by many others in connection with beauty contests, the public has come to recognize any such beauty contest as having a separate and distinct origin from the "MISS AMERICA" contest of Miss America Pageant. Further, such evidence was intended to show that the dominant portion or feature of the contest names was the word or words describing the particular characteristic of the contest winner; e.g., "Tall" ("Miss Tall America"), "Teen-Age" ("Miss Teen-Age America"), "Tan" ("Miss Tan America"), etc.

Evidence was also introduced that Palisades Pageants, Inc. had used the name "LITTLE MISS AMERICA" since August 30, 1963 and that Miss America Pageant did not offer any objection until the filing of its Notice of Opposition in the Patent Office on October 20, 1966. While the evidence is not substantial with respect to establishing actual knowledge by Miss America Pageant, the lower Court concluded that, "it

seems highly unlikely that the publication of appellant's (Palisades Pageants, Inc.) mark in the Official Gazette was the first appellee (Miss America Pageant) had heard of it." Palisades Pageants, Inc. submitted evidence of extensive advertising in the northeastern United States, including New Jersey (the home State of both parties). In reliance upon the acquiescence by Miss America Pageant, Palisades Pageants, Inc. expended considerable sums in the promotion and advertising of its mark "LITTLE MISS AMERICA". Thus, Palisades Pageants, Inc. contends that Miss America Pageant should now be estopped from claiming that it will be damaged by registration of the mark "LITTLE MISS AMERICA".

The basis of federal jurisdiction in the court of first instance was 28 U.S.C. 1542(2).

VI. ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT

The question of what constitutes an appealable issue to the Court of Customs and Patent Appeals *in a trademark case* before the Patent Office is a highly important question of Federal law which, to the knowledge of counsel, has not been settled by this Court. Here, the particular issue or question of properly identifying the goods or services in an application before the Patent Office seeking registration of a mark applied to such goods or services is deemed to be very closely related to the ultimate question of likelihood of confusion with prior registrations. Hence, since the particular issue is logically related to consideration on the merits of the ultimate issue, the particular issue should be reviewable upon appeal to the Court

of Customs and Patent Appeals, along with the ultimate issue.

With regard to the second question presented for review, this is also an important question of Federal law since it bears upon the weight to be accorded prior Federal trademark and service mark registrations granted to others with respect to narrowing the scope of protection to be extended to each of such registrations containing words commonly used in trademark or service marks for certain goods or services.

VII. OPINIONS AND JUDGMENTS BELOW

Appended hereto are copies of the opinions of the Court of Customs and Patent Appeals and Patent Office Trademark Trial and Appeal Board.

Respectfully submitted,

PALISADES PAGEANTS, INC.
STANFORD W. BERMAN
1730 Rhode Island Ave., N. W.
Washington, D. C. 20036
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF
CUSTOMS AND PATENT APPEALS

October Term, 1970

Patent Appeal No. 8497

Opposition No. 46,848

PALISADES PAGEANTS, INC., *Appellant,*

v.

MISS AMERICA PAGEANT, *Appellee.*

May 27, 1971

Opinion

RICH, Judge.

This appeal[1] is from the decision of the Patent Office Trademark Trial and Appeal Board, 158 USPQ 664, sustaining appellee's opposition to appellant's application to register the service mark LITTLE MISS AMERICA on the Principal Register, serial No. 216,728, filed April 16, 1965, asserting first use of the mark on August 30, 1963. We affirm.

[1] The Petition of Appeal states that appellant "has complied with the provisions of 35 U.S.C. 142 and 143," which pertain to appeals in patent rather than trademark cases. However, we have construed the appeal as if filed pursuant to 15 USC 1071(a), the provision governing appeals to this court in trademark cases.

The Parties

Appellant is a for-profit corporation which conducts beauty contests for young girls, ages five to ten years, at Palisades Amusement Park, New Jersey. It seeks to register the mark "for promoting the sale of the goods and services of others through the medium of contests." Chief among those whose goods and services appellant, Palisades Pageants, Inc., has promoted has been Rosecliff Realty Company, the owner of Palisades Amusement Park, but it has also used the mark in connection with the promotion of the goods and services of various "participants" in the annual contests, including a manufacturer of modish clothing for little girls.

Appellee is a not-for-profit corporation which conducts beauty contests for young women, ages eighteen to twenty-eight years, in Atlantic City, New Jersey. It relies on its common-law rights stemming from use of the mark MISS AMERICA since 1921 and on its Principal Register registration, No. 631,496, issued July 24, 1956, of the same mark for services stated in its registration to be the

> PROMOTION OF EDUCATION THROUGH THE GRANTING OF SCHOLARSHIPS, THE RECIPIENTS BEING SELECTED IN LOCAL, STATE, AND NATIONAL CONTESTS, BASED ON SUCH FACTORS AS BEAUTY, PERSONALITY AND TALENT, * * *.

Money for the scholarships comes from, inter alia, the "sponsors" of the pageant, which are for-profit corporations the goods and services of which are promoted in connection with the pageant.

The Issues

There are three issues. After both sides had taken testimony, appellant moved to amend the statement of services in its application to further distinguish the beauty contests which it runs from the beauty contests run by opposer by adding the words "for female children between the ages of five and ten" to the description of its beauty contests. The board denied its motion on the ground that the "proposed amendment is [not] determinative of the issues herein," appellant has appealed the denial here, and the first question is whether we have jurisdiction to determine such an appeal. The second question is likelihood of confusion, and the third question is whether appellee is estopped to oppose appellant's application by reason of its previous failure to take action to prevent appellant's use of the mark.

A. *Jurisdiction*

The jurisdiction of this court in trademark matters is set forth in 28 USC 1542(2). This section expressly grants us jurisdiction in "appeals from decisions of: * * * the Commissioner of Patents as to trade-mark applications and proceedings as provided in section 1071 of title 15." Paragraph (a)(1) of the latter section states, inter alia, that:

> An applicant for registration of a mark, party to an interference proceeding, party to an opposition proceeding, party to an application to register as a lawful concurrent user, party to a cancellation proceeding, a registrant who has filed an affidavit as provided in section 8, or an applicant for renewal, who is dissatisfied with the decision of the Commissioner *or Trademark Trial and Appeal Board*, may appeal to the United States Court of Customs and Patent Appeals * * *. [Emphasis ours.]

Despite the language of 28 USC 1542, appellee is not questioning our jurisdiction to review at least certain decisions of the Trademark Trial and Appeal Board.[2]

However, not *all* "decisions" of the Trademark Trial and Appeal Board, in the broad, general sense of the word "decision," are appealable to this court any more than are all "decisions" of the Commissioner, the Patent Office Board of Appeals, or the Board of Patent Interferences. The same appealable versus petitionable dichotomy which obtains in patent matters obtains in trademark matters, *In re Railley Corp.*, 28 CCPA 1122, 1127-28, 119 F.2d 595, 598-99, 49 USPQ 377, 380 (1941), although the question of which side of the line a given matter falls on seems to come up less often in the trademark context than in the patent context. Here, the decision of the board dismissing the opposition is clearly appealable, but, as in *In re Hengehold*, 58 CCPA ——, ——, —— F.2d ——, ——, —— USPQ ——, —— (1971), we must decide whether a secondary decision made in the same case by a tribunal of the Patent Office (there a patent examiner, here the Trademark Trial and Appeal Board) is so "logically related" to the appealable decision that it, too, may be reviewed on appeal. Cf. *In re James*, 57 CCPA 1371, 1375, 432 F.2d 473, 476, 167 USPQ 403, 406 (1970) (concurring opinion of Judge Lane).

The jurisdiction-giving issues in this case are whether the service mark LITTLE MISS AMERICA so resembles the service mark MISS AMERICA as to be likely, when

[2] We note that 28 USC 1542 was last amended in 1949, while 15 USC 1071 was amended in 1958 to authorize appeals to the Court of Customs and Patent Appeals by persons dissatisfied with the decision of the Trademark Trial and Appeal Board and to substitute "Trademark Trial and Appeal Board" for "Commissioner" in a portion of paragraph (a)(1) not quoted. Pub. L. 85-609, 72 Stat. 540 (1958). It seems likely that, were the question to be directly presented, we would have to read the more recent enactment as broadening the scope of the older.

applied to the services stated in appellant's application, to cause confusion, or to cause mistake, or to deceive, 15 USC 1053, 1052(d), and whether, even if the former does so resemble the latter, the appellee is estopped from preventing appellant's registration by reason of laches. 15 USC 1069. The services described in the application, registration of which has been refused, are "promoting the sale of the goods and services of others through the medium of beauty contests." We do not see how the board's decision to refuse to permit the applicant to amend that description is logically related to either of the above issues. Appellant has argued that "logic and equity would dictate that this Motion should have been granted" because, as things stand, it has

> * * * had no ruling on a significant issue supported by adduced uncontradicted facts, and will be forced to the needless expenditure of time and expense in re-filing its application and contesting another opposition which Opposer's counsel has said would be filed * * *.

Whether or not the board abused its discretion in denying appellant's motion in the face of this argument, however, was a matter to be determined, not by this court, but by the Commissioner of Patents, under well-settled principles of law. *Martin* v. *Crown Zellerbach Corp.*, 57 CCPA 968, 969 n. 1, 422 F.2d 918, 919 n. 1, 165 USPQ 171, 172 n. 1 (1970).

B. *Likelihood of Confusion*

Notwithstanding the facts that (1) appellant is a for-profit corporation, whereas appellee is a not-for-profit corporation, and that (2) appellant's application states that it uses its mark to promote the goods and services of others, without mentioning the prizes it gives the winners of the beauty contests it runs, whereas appellee's registration states that it uses its mark to promote edu-

cation through the granting of scholarships (the scholarships being the prizes which it gives the winners of the beauty contests *it* runs), without mentioning the promotion of the goods and services of others which it does to earn the revenue from which it pays the scholarships, the board found that "the services of the parties must be considered as practically identical." We agree, for though the record discloses vast differences in the scale and details of their operations, it seems to us that both would be perceived by the public at large as being in the same general business.

Appellant has made of record numerous third-party registrations for such marks as MISS TEEN-AGE AMERICA, MRS. AMERICA, MISS UNITED STATES OF AMERICA, etc., and it argues here, as it did below, that there are so many, very similar marks in the field of beauty contests that members of the general public would not be likely to assume that any two such contests were run by the same enterprise. While we agree with the appellant that this does, indeed, seem to be a crowded field, we are of the opinion that appellant's mark is closer to appellee's than even the closest of the third-party registrations in that it bodily incorporates appellee's mark, merely adding an adjective to the beginning thereof which, as the board observed, "directs attention to the words which follow." Additionally, we are willing to take judicial notice that appellee's mark is exceedingly well known. On balance, we agree with the board that appellee's mark is entitled to protection from registration of a mark as close thereto as appellant's, for use in identifying substantially the same services.

C. *Estoppel by Acquiescence*

Appellant has argued that, even if there is a likelihood that simultaneous use by the parties of their respective marks will engender confusion as to sponsorship of their respective beauty contests, appellee is still estopped to

oppose appellant's application by reason of its previous failure to take action to prevent appellant's *use* of the mark. The record supports the assertion contained in appellant's application that their mark has been in use (by appellant and its predecessor in interest) since August 30, 1963, and the first action taken against appellant by appellee was its filing of a notice of opposition, which it did on October 20, 1966. Intermediate these dates, the only evidence of record that appellee was aware of appellant's use of the mark was the testimony of appellant's publicist that he had written appellee, perhaps in 1963 and definitely no later than 1964, asking if it would like to have the winners of the LITTLE MISS AMERICA contest appear at the finals of the MISS AMERICA contest. Appellee's associate executive director testified that she "vaguely recall[ed]" receiving a letter from appellant, but appellant's publicist stated that he had received no response to his letter, and apparently nothing ever came of the contact. However, appellant did submit evidence of extensive advertising in the northeastern United States, including New Jersey (the home state of both parties), and it seems highly unlikely that the publication of appellant's mark in the Official Gazette was the first that appellee had heard of it. On this record, the board held that appellant had failed to prove that it had "relied on opposer's lack of affirmative action in expanding its business or that opposer led applicant to believe that it did not object to the use of its mark;" but that, in any event, "the period of time here involved is considered too short under the circumstances of this case to give rise to an estoppel." (Footnote omitted.)

As we remarked earlier in this opinion, appellee's is an exceedingly well-known mark. Furthermore, the field of beauty contests is a crowded one, and, as shown by the third-party registrations in this case, from time to time many marks quite similar to appellee's have been used at least enough to support the registration thereof.

In particular, appellant's publicist testified that Palisades Amusement Park had previously held contests to choose a MRS. AMERICA, a MISS AMERICAN TEENAGER, a GRANDMA AMERICA, a MISS LATIN AMERICA, a MISS ITALIAN-AMERICA, and a MISS POLISH AMERICA, as well as other such contests "for every age group, without discrimination, to every ethnic group that we could possibly come up with." However, his use of the past tense in connection with these contests, as well as appellant's failure to submit evidence of continued use of even the third-party registrations in its own name (MISS AMERICAN STARLET and MISS ITALIAN-AMERICA), supports appellee's contention that "These ventures come and go." Under the circumstances, we agree with the board that appellee's acquiescence in appellant's use of the mark LITTLE MISS AMERICA was for too short a period of time to estop appellee from opposing appellant's application.

DECISION

The decision of the Trademark Trial and Appeal Board is *affirmed*.

AFFIRMED

Baldwin, J., concurs in the result.

Hearing:
May 7, 1968

U. S. DEPARTMENT OF COMMERCE
PATENT OFFICE

Trademark Trial and Appeal Board

MISS AMERICA PAGEANT

v.

PALISADES PAGEANTS, INC.

Opposition, No. 46,848, to application Serial No. 216,728, filed April 16, 1965.

Symmestvedt & Lechner for Miss America Pageant.

Berman, Davidson and Berman for Palisades Pageants, Inc.

Before Leach, Waldstreicher, and Shryock, Members.

Opinion by Shryock, Member:

Palisades Pageants, Inc. has filed an application to register "LITTLE MISS AMERICA" as a service mark for promoting the sale of the goods and services of others through the media of beauty contests,[1] use since August 30, 1963 being asserted.

[1] Following the taking of testimony and filing of briefs, applicant moved to amend its identification of services by adding the restriction "for female children between the ages of five and ten". Since we do not believe this proposed amendment is determinative of the issues herein, entry thereof is denied, subject to renewal of the motion to amend should applicant ultimately prevail herein.

Registration has been opposed by Miss America Pageant, registrant of "MISS AMERICA" as a service mark for promotion of education through the granting of scholarships, the recipients being selected in local, state, and national contests, based on such factors as beauty, personality and talent.[2]

Both parties have taken testimony. In addition, applicant has filed a notice of reliance on copies of a number of third-party registrations for marks which include the words "AMERICA" or "MISS AMERICA" for promotional services and/or beauty contests.

Opposer's record establishes that it has used the mark "MISS AMERICA" for its services, as set forth in its registration, for many years prior to applicant's use of its mark. In this connection, opposer is a non-profit corporation, which is supported in part by the contributions of various business enterprises in return for the right to feature "MISS AMERICA" in connection with their products. Also, state and local contests are sponsored by such organizations as the Rotary Club, Kiwanis Club or Junior Chamber of Commerce and involved the help of thousands of volunteers. Opposer's activities under the mark are extensively publicized, inter alia, on television and radio and in newspapers and national and local souvenir books. All of opposer's activities culminate in the Miss America Pageant, held annually in Atlantic City, New Jersey, where it is stressed that "MISS AMERICA", the winner of the contest, is the ideal of American womanhood. There can be no doubt on the record presented that "MISS AMERICA" is exceedingly well known as an identification of opposer's services and as the name of the individual unmarried female winning the national contest.

Opposer has introduced in evidence copies of seven letters which bear dates between January 1964 and April

[2] Reg. No. 631,496, issued July 24, 1956.

1967, and shown (sic) that parents have written to opposer asking for information relative to entering their daughters in the "LITTLE MISS AMERICA" pageant or contest.

Applicant is a profit corporation which conducts beauty contests for young girls, ages five to ten years, at Palisades Amusement Park, New Jersey, under the mark "LITTLE MISS AMERICA". These contests have been conducted since 1963 and are judged primarily on beauty, poise and personality rather than talent. Contestants enter the contests from many states of the United States and extensive coverage is received in local newspaper. In addition, the "LITTLE MISS AMERICA" contest is advertised in the New York City area on radio, television and transit card advertisements. Since 1965, the finals of the "LITTLE MISS AMERICA" contest has been televised on a New York City Station which is heard in nine states on the East Coast.

Opposer is clearly the prior user of its mark and, despite applicant's urgings to the contrary, the services of the parties must be considered as practically identical.

Opposer urges that applicant has bodily incorporated its mark and merely added the descriptive adjective "LITTLE" as a prefix thereto.

Applicant takes the position that since others have frequently adopted and registered marks such as "MISS INDIAN AMERICA", "MISS BRONZE AMERICA", "MISS TEEN-AGE AMERICA", "MISS SKI AMERICA", "MISS TALL AMERICA", "MISS HIGH SCHOOL OF AMERICA", "MISS TAN AMERICA" and other marks of like import for services substantially similar to those here involved, opposer's "MISS AMERICA" is a weak mark entitled to a narrow scope of protection. Applicant urges that since opposer has had knowledge of applicant's activities under its mark for a long

period of time[3] without taking any affirmative action, it is guilty of laches, and since applicant relied on the tacit acquiescence of opposer in the use of the mark and the expansion of its business thereunder, opposer is estopped from now claiming that it would be damaged by the registration sought.

Assuming arguendo that opposer's "MISS AMERICA" is a weak mark because of the third-party registrations, it is still entitled to protection from a competitor's mark which is substantially identical thereto. See: King-Kup Candies, Inc. v. King Candy Company, 129 USPQ 272 (CCPA, 1961). In the instant case, applicant's mark has merely added the descriptive word "LITTLE" to opposer's mark "MISS AMERICA" and this qualifying adjective directs attention to the words which follow. In the case of the third-party registrations which include the words "MISS" and "AMERICA", all of these contain a qualifying term between these words. If opposer's mark is entitled to any protection under the Statute, we believe that it should be protected against a competitor who merely adds a descriptive word to the beginning thereof. While the letters from parents are not conclusive that many instances of actual confusion have occurred[4] they, nevertheless, do confirm our holding that where "LITTLE MISS AMERICA" and "MISS AMERICA" are used on substantially identical services there would be a likelihood of confusion or mistake. cf. Libby-Owens-

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[3] The earliest knowledge of applicant's mark established by the record herein is a letter from a parent in January 1964. There is testimony by a publicist for applicant that either in 1963 or 1964 he wrote the executive secretary of opposer asking if their little girls might appear on the final of the "MISS AMERICA" pageant. This testimony is too vague and indefinite to attribute any knowledge of applicant's mark to the opposer, and it is admitted that this letter cannot be located and that there was no answer thereto.

[4] A few of these letters indicate, or state, that the writer knows that the parties are not connected.

Ford Glass Company v. Thermoproof Glass Company, 156 USPQ 510 (CCPA, 1968).

As to opposer's defense of laches and estoppel, there is no acceptable evidence that applicant relied on opposer's lack of affirmative action in expanding its business or that opposer led applicant to believe that it did not object to the use of its mark. In any event, the period of time here involved is considered too short[5] under the circumstances of this case to give rise to an estoppel. cf. Ralston Purina Company v. Midwest Cordage Company, Inc., 153 USPQ 73 (CCPA, 1967); and Byer-Rolnick Hat Corporation v. Atsons Products Corporation, 130 USPQ 41 (TT&A Bd., 1961); and cases cited therein.

Decision:

The opposition is sustained; and registration to applicant is refused.

M. Beach

H. Waldstreicher

R. F. Shryock
Members, Trademark
Trial and Appeal Board

[5] The notice of opposition was filed in October 1966.